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LAW AND DEVELOPMENT SYMPOSIUM

Beyond a fourth moment in law and development

A plea for heterodoxy

WOUTER VANDENHOLE — 12 July, 2018



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In the wake of the decolonization wave after World War II, a law and development (L&D) practice and academic strand emerged. So far, scholarship on law and development that self-identifies as L&D has been predominantly economic in orientation. It has never moved beyond a market-friendly or market-centered approach. This tradition has also adopted a fairly naïve instrumentalist approach to law.

I submit that scholars who are more concerned with the role of law in global justice (LiGJ) should not so much claim or pursue a new orthodoxy in L&D scholarship, but rather actively cultivate heterodoxy. Attempts to address wicked problems such as the role of LiGJ benefit more from viewpoint diversity than from consensus thinking.

Moments in L&D

In Trubek's and Santos' view, three moments can be identified in L&D studies. Moments are defined as periods "in which law and development doctrine has crystallized into an orthodoxy that is relatively comprehensive and widely accepted" (p. 2). These three moments are: 1. Law as an instrument of the state; 2. Law as an instrument of the market; and 3. Law as a regulator of the market.

I am increasingly convinced that LiGJ scholarship should not so much claim or seek to appropriate the L&D label, but rather keep a critical distance from it. Of course, appropriating the L&D label would put questions of global justice and transformative social change firmly on the L&D agenda, and de-center somewhat the economism that tends to dominate the field. If successful, such an exercise might fundamentally reorient the overall L&D agenda, and give LiGJ scholarship more visibility and recognition. However, I

see four interrelated risks and needs that outweigh these potential advantages, and make these pros unlikely to happen.

Preambulisation and co-optation

The shifts between the three L&D moments so far have all taken place within the same paradigm that is mainly preoccupied with economic development, is rooted in an instrumentalist understanding of the law, and presupposes a Western-type liberal state. It seems therefore highly doubtful that any new moment of L&D consensus will be able to transcend that paradigm. Any reference to LiGJ questions in an L&D moment runs the risk of being merely preambular, with mere lip-service being paid to global justice before getting to the “core issue” of economic development.

A related risk of becoming too much associated with L&D moments is that it may lead to co-optation and compromise the sharp edge of scholarship on global justice. Any critical engagement with law and development beyond or outside the L&D paradigm has taken place not in new consensus moments, but in heterodox thinking. LiGJ scholarship may learn more from heterodoxies than in orthodox thinking.

Radical break

Some co-optation has already been happening. For example, Garth has argued that human rights have been part and parcel of the elitist, liberal establishment that initially promoted law and development: “The critique of law & development, in short, was made to facilitate a new progressive law made for export – human rights as a kind of

public interest law abroad directed against authoritarian states.” (p. 345). This analysis suggests that a clear break with previous L&D moment is needed.

Viewpoint diversity

The presence of orthodoxy has been problematized when it comes to wicked problems. What the role of law in development is, clearly is such a wicked problem that requires viewpoint diversity rather than orthodoxy. Hence, LiGJ scholarship would not benefit but rather suffer from becoming a fourth *consensus* moment in L&D. Moreover, LiGJ scholarship may fall prey to a risk that has characterized the L&D field in the broad sense, the challenge of what Garth has called the “double-agency strategy”: while criticizing L&D it may at the same time behave as “progressive missionary reformers” (p. 347). That risk gives all the more reason for valuing viewpoint diversity and cultivating heterodoxy, also *within* LiGJ.

Context-specificity

A fourth argument militating against LiGJ scholarship pursuing a fourth L&D moment is the need to take context-specificity fully into account. Any grand theory or consensus seems to assume a degree of universal response to challenges that arise in very specific contexts. Whereas it is increasingly acknowledged that no universal blue prints exist, there is a tendency among L&D scholars to believe that middle-level generalisations are possible and that possibilities for horizontal learning may exist.

LiGJ scholarship may and should be extremely cautious in dealing with context-specificity. Insights from legal

anthropology with regard to human rights law may also be of relevance to the broader law and global justice field. Merry's notion of vernacularization to describe the adaptation of international human rights to local contexts and on the ambiguous position of “translators” – intermediaries who translate international human rights norms into local contexts – may be helpful in better understanding when and how legal interventions work in a specific context. Translators are at the same time powerful and vulnerable. That ambiguous position of power and vulnerability in tandem, shapes the process of vernacularization into an approach that is somewhere on the continuum between replication and hybridization. These insights may help in better understanding how context impacts on legal interventions, how most legal transplants are bound to fail, and how important it is to leave space for diversity in LiGJ work and scholarship.

The way forward

Whereas this plea against efforts by LiGJ scholarship to pursue recognition as a fourth L&D moment is theoretically attractive, there is also a need felt within that community to self-define itself (better). One way of doing this is by more explicitly self-identify as heterodoxy, as *challenges* to L&D consensus thinking. At the same time, L&D needs to be part and parcel of the viewpoint diversity that I have argued for. It is therefore also important to engage in a sustained conversation with L&D scholarship.

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